

The only issue before the Board on this appeal is whether claimant proved he was an employee of respondent for purposes of the Workers Compensation Act.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the Board concludes the April 6, 2006, preliminary hearing Order should be affirmed.

There is no dispute that claimant sustained severe burns on September 20, 2005, while working on a house that was being built by respondent, a general contractor. Claimant contends he was working for respondent at the time of the accident as an employee. But respondent and its insurance carrier contend claimant was working for respondent as a self-employed subcontractor. The distinction is critical as claimant must prove he was working as an employee of respondent before he would be entitled to receive workers compensation benefits.

It is often difficult to determine in a given case whether a person is working as an employee or independent contractor because the employer-employee and principal-independent contractor relationships share similar elements.<sup>1</sup> There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>2</sup> Instead, the relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. Consequently, the terminology used by the parties is not binding when determining the true nature of their relationship.<sup>3</sup>

On the other hand, the primary test used by the courts in determining whether the employer-employee relationship exists is whether the alleged employer has the right of control and supervision over the work of the alleged employee along with the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of control by the employer but, instead, it is the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.<sup>4</sup>

Furthermore, in examining the legal nature of a business relationship, the courts have also looked at other factors, including but not limited to: (1) whether a contract exists to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) whether the worker employs assistants over which the worker has the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work;

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<sup>1</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>2</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>3</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>4</sup> *Wallis*, 236 Kan. at 102-103.

(6) the length of time the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work being performed is part of the regular business of the employer.<sup>5</sup>

The Board concludes claimant was working for respondent as an independent contractor at the time of his accident. Claimant was a self-employed painter doing business as CPT Painting. Claimant maintained a business checking account under that name and included that business activity in his 2004 United States Individual Income Tax Return. In addition, claimant also purchased workers compensation insurance, which he initially believed was in existence on the date of accident, for that business activity. Although claimant primarily painted houses that respondent was building, claimant was free to, and did, work for others.

The records introduced into evidence indicate claimant hired others, whom claimant paid. Claimant provided all the tools and equipment required to perform his work. In addition, claimant was responsible for picking up and paying for all of the paint and other supplies he used in his work.

Although it is true that respondent inspected claimant's work and sometimes required claimant to work within a certain schedule, it appears respondent's control extended only so far as to maintain control of the project in terms of timeliness and quality. There is no indication that respondent set claimant's work hours or otherwise controlled claimant's work in such a manner that would suggest claimant was working for respondent as an employee at the time of the accident. Claimant was not paid by the hour but by the square foot. Claimant billed respondent on a monthly basis by invoice. Respondent withheld no payroll taxes from the money it paid claimant.

Finally, claimant was aware that he was a self-employed individual. That fact is indicated by his tax and accounting records and his purchase of workers compensation insurance. Even the medical records from Via Christi Regional Medical Center that claimant introduced into evidence indicate claimant was a self-employed painter doing business as CPT Painting.<sup>6</sup>

In summary, claimant has failed to prove that on the date of accident he was working for respondent as an employee. Accordingly, claimant's request for benefits should be denied.

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<sup>5</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>6</sup> P.H. Trans., Cl. Ex. 2.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>7</sup>

**WHEREFORE**, the Board affirms the April 6, 2006, preliminary hearing Order entered by Judge Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2006.

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>7</sup> K.S.A. 44-534a(a)(2).